

2. Curbing corruption through transparency and fairness

Transparency and fairness are essential preconditions for containing corruption in public procurement. Transparency renders abuse difficult and increases the likelihood of detection. Also, as bidders must trust in the fairness of the process to participate in a tender, the perception of transparency is crucial in attracting the largest possible number of tenderers and increasing competition. Ample participation also protects against bribery, favoritism, nepotism, and collusion—forms of corruption that become difficult to sustain when many actors have stakes in the process.

A transparent and fair procurement process requires legislative and administrative measures in four dimensions: transparency of the proceedings, protection against corruption-induced manipulation of the procurement method, fair prequalification procedures, and transparent and fair selection of the winning tenderer.

a. Transparent proceedings

Transparency requires, first of all, clearly defined procurement parameters—such as conditions of participation, eligibility of suppliers, timelines, requirements, technical specifications for the procured goods or services, criteria for the rejection of a bid or the disqualification of a supplier, criteria for the evaluation of offers, contract terms—and transparent and fair evaluation of all proposals and selection of the winning tenderer. Opaque dimensions create opportunities for corruption-induced manipulation. Thus, all these objective criteria must be clearly defined and stated beforehand. Second, information about the procurement procedures and their regulatory framework must be available to all potential suppliers in understandable terms. Third, transparency requires easy access by potential bidders to information explaining the procurement procedures, which must be comprehensive.

Well-defined parameters

To ensure transparent parameters for a given tender, the procurement regulations in some countries (e.g., Pakistan, Palau, the Philippines) describe in detail the required content of procurement documents. Besides laws defining the minimum information in tender documents, standard tender and contract documents are used to ensure a high degree

of transparency and consistency in P.R. China; Hong Kong, China; Korea; Mongolia; Palau; the Philippines; Singapore; and Thailand. Korea has centralized all major government procurement in a single agency to achieve even greater uniformity. Australia leaves the design of procurement documents partly to the procuring entities, but provides guidance in the development of such standard documentation. In India, the contents of bidding documents, as well as various parameters concerning the execution of the bidding and delivery, are prescribed. Indonesia, Japan, and Pakistan have developed model documents for the procurement of certain goods, but their use is not mandatory and therefore spotty. Pakistan and Vietnam prepare standard documents for broader application, and Samoa also plans to draw up such documents.

The use of comprehensive standard contract documents also helps avoid negotiations at the time the contract is awarded. Unlike negotiations that may be required in the implementation of the procurement contract, negotiations during the awarding of the contract can be avoided. Such negotiations provide opportunities to offer or extort kickbacks or bribes. Their goal of clarifying details of a contract can and should be achieved through a comprehensive definition of contract parameters beforehand. To prevent such negotiations, Kyrgyz law requires the procuring entities to provide a model contract with the procurement documents, and procuring agencies in Australia are encouraged to proceed similarly. Indonesia, Japan, the Kyrgyz Republic, Nepal, and Singapore formally forbid post-tendering negotiations but have no specific mechanism that would render them unnecessary. Despite the corruption risks inherent in negotiations during the awarding of the contract, some countries permit such negotiations under certain circumstances or for certain purposes. India, Kazakhstan, and Korea allow post-tendering negotiations with the potential supplier solely to reduce the price. Pakistan and, for certain types of contract, Vietnam permit post-tendering negotiations on technical issues that might influence the price—a method that might undermine the effect of the preceding tendering.

Availability of documentation

To render complex procurement procedures transparent and clear to potential suppliers, particular efforts to make known rules, regulations, and procedures are commended. Comprehensive procurement manuals for suppliers have been drawn up in Australia; Hong Kong, China; India; Korea; Singapore; and Thailand. These manuals are easily accessible on the Internet.

Transparent proceedings

Many corruption schemes in the tendering and selection process are based on some form of abuse; transparent proceedings and easy access by bidders to essential information on the tenders are thus key deterrents to corruption in this phase. The opening of bids is a particularly crucial stage, as it constitutes a break in the process. Opening the offers in public or at least in the presence of all bidders or their proxies helps ensure that documents have not been altered or destroyed and allows manipulations to be detected at an early stage. To avoid leakage of information on the lowest bid to a preferred supplier and to exclude late bids, the bid opening ideally takes place immediately after the tender period. This procedure is foreseen in the rules of the Kyrgyz Republic and Vietnam. Procurement laws in P.R. China, Korea, Mongolia, the Philippines, and Thailand require the opening of the bids in public but do not specify that it has to take place immediately after the tender period. Japan requires tenderers or their proxies to be present at the bid opening, but allows noninvolved staff of the procuring entity to take their place as witnesses. There is no regulation concerning the presence of bidders during the bid opening in the Cook Islands; Hong Kong, China; and Palau; the procurement legislation only requires the presence of two officials (Cook Islands), at least two "qualified persons" (Hong Kong, China), or two witnesses (Palau), without, however, specifying the qualifications of these witnesses or defining incompatibilities.

Transparency of the criteria and process of bid evaluation is crucial in bolstering the bidders' trust in the fairness of the procedures. Just as bidders should be allowed to be present at the opening of the bids, bidders should also be informed of the outcome of the selection, allowing them to review the evaluation result. Both winning and losing bidders are informed in Australia; the Cook Islands; Hong Kong, China; Japan; the Kyrgyz Republic; Mongolia; Pakistan; Palau; and Vietnam. In addition, the Kyrgyz Republic and Vietnam publicize the evaluation results in a procurement bulletin. Korea and Hong Kong, China publish this information in the government gazette and on the Internet, and make additional information available to those who request it. In Australia, details of awarded contracts valued at more than AUD10,000 (approximately USD7,700) must be published on the Government's central procurement Web site. Hong Kong, China also publishes information on awarded tenders on a central Web site. In Thailand, the identity of the selected supplier is announced on a Web site and the reasons for the award to this supplier are made available on request. On

the other hand, legislation in Bangladesh, India, and the Philippines does not explicitly require the announcement of the tendering results to the unsuccessful bidders. In India, the reasons for the selection of the winning bidder must be recorded but are not made available to the bidders.

b. Selection of the procurement method

In most countries covered by this report, procurement by open tendering is the default method of procurement and accounts for the largest share of the value of procured goods and services. But it is not the only method practiced. Most procurement frameworks also provide for other methods, such as restricted tendering, request for proposals, canvassing, reverse auction, and single-source procurement.¹ However, some of these methods, employed to speed up procurement or achieve other advantages, entail specific risks of abuse and corruption. Restricted tendering and single-source procurement, for instance, can be improperly used to select a bribe-paying supplier or to avoid public knowledge and scrutiny. A common corruption scheme is to deliberately create conditions that allow the use of methods such as restricted or single-source procurement, for instance, through deliberate failure of open tendering.

Deviation from standard procedures

The procurement frameworks of various countries foresee conditions under which procurement methods other than open tendering may be used. First, some countries (Australia; Bangladesh; P.R. China; Hong Kong, China; India; Indonesia; Korea; Kyrgyz Republic; Pakistan; Palau; Samoa; Vanuatu) do not require open tendering if the value of the procured goods or services is below a certain threshold and therefore does not warrant a long and complex process like open tendering. To protect against abuse, adequate thresholds must be set and the arbitrary splitting of the purchase into smaller contracts must be prohibited. Furthermore, measures must be taken to prevent repeated orders following an initial lower contract assigned to a certain bidder. Australian, Indian, and Kyrgyz procurement regulations, for instance, explicitly forbid the splitting of purchases. The use of repeated orders is likewise subject to strict conditions in some countries' regulations.

¹ Different terms are used for very similar procedures. This report adopts the terminology of the UNCITRAL model law on public procurement.

The laws in many countries provide for conditions under which procurement rules do not apply (cases of emergency in P.R. China, Indonesia, Samoa) or alternative methods such as negotiated contracting or limited tendering may be used instead (Australia; P.R. China; Hong Kong, China; India; Kyrgyz Republic; Mongolia). Such provisions, which meet essential practical needs, require sound protection against the deliberate creation of a situation of emergency. Some countries achieve such protection by enumerating the possible grounds for an emergency—as Korea has done—and by excluding delays in procurement scheduling from the definition of an emergency. Other countries (such as Bangladesh; P.R. China; and Hong Kong, China) require the approval of a superior authority for a change in procurement method.

When there are not enough potential suppliers for technical or other reasons, restricted tendering is applied in Bangladesh; India; Indonesia; Palau; and Hong Kong, China; but the justifications for the assumption are not fully clarified in all cases. In addition to the mentioned grounds for changing the procurement method, Bangladesh and Palau allow a change for unspecified reasons, thereby creating a particularly high risk that the default method of open tendering will be circumvented. India similarly permits limited tendering if open tendering is “not in the public interest.”

Deliberate failure of tendering

In many countries, receiving an insufficient number of responsive bids—failure of tender—is also often used to justify resorting to negotiated or direct contracting, methods that are particularly vulnerable to corruption. Corrupt procurement personnel can easily stage a failure of tender by setting inadequate bidding conditions or unrealistic or contradictory requirements, specifications, or budgets, or by insufficiently publicizing the bid opening. To protect public procurement against such risks of abuse, tender failure should be avoided as far as possible and mechanisms must be provided for properly managing it if it occurs.

Two measures will help reduce instances of tender failure. One way is to set severe conditions in the procurement regulations for declaring a failed tender. A tender is deemed to have failed if not a single responsive bid was received, in Australia; Hong Kong, China; Korea; Mongolia; the Philippines; Singapore; Thailand; and other countries. In Kazakhstan, a tender failure is declared if only one responsive bid was received. In P.R. China and Vietnam, a failed tender is one where there are less than four bids.

Instances of tender failure can also be reduced by making the bidding known to the greatest number of possible suppliers. While this measure is mainly seen as increasing competition and thus economy in public procurement, it can also help reduce corruption risks. Having a high number of bidders not only increases the chances of receiving responsive bids but also diminishes the risk of collusion and bidding cartels, and reduces opportunities for favoritism and nepotism. Moreover, strong participation typically reinforces scrutiny of the procurement, as more competitors have an interest in the proceedings.

To attract the greatest possible number of bidders, most countries require the publication of tender opportunities in the press (Bangladesh, P.R. China, Cook Islands, India, Indonesia, Kazakhstan, Kyrgyz Republic, Nepal, the Philippines, Samoa, Vietnam), in government gazettes (P.R. China; Hong Kong, China; Fiji Islands; India; Japan; Korea; Kyrgyz Republic; Vietnam), or on Web sites. In addition, procurement departments are also required (Hong Kong, China) or advised (India) to publish tender openings in selected international journals and to notify consulates and overseas trade commissions where appropriate. Pakistan announces tender opportunities of smaller value on a procurement Web site, and publishes the opening of major tenders in the press as well.

Indeed, the publication of bids on the Internet is becoming increasingly common. Bid openings are published on central Web sites in Australia; Bangladesh; Hong Kong, China; India; Korea; Pakistan; Singapore; and Thailand. In Japan, information is available on the Web site of each government entity and through publicly accessible electronic databases; central websites provide more general procurement information. P.R. China, the Kyrgyz Republic and the Philippines, to varying degrees, also use the Internet to announce tenders. Kazakhstan has launched a database to assist procuring entities and suppliers; not all tenders are listed, however. In this context, it is worth noting that the use of information technology in the dissemination of procurement information shows its advantages only if both the procurement services and the potential suppliers have a sufficient and reliable technical infrastructure. In some countries, the mere availability of the Internet does not yet justify relying on this medium alone.

Unrealistically short bidding periods can further limit participation and possibly lead to failure of tender, collusion, and nepotism. In many countries (e.g., Australia; P.R. China; Hong Kong, China; India; Mongolia; the Philippines; Singapore) the procurement frameworks thus prescribe a "sufficient" period for the submission of bids. Many countries also set

minimum periods for the preparation of bids—14 days in the Cook Islands and Singapore; 15 days in the Kyrgyz Republic; 20 days in P.R. China; 21 days in India and Thailand; 25 days in Australia; 30 days in Kazakhstan, Mongolia, Pakistan (for unrestricted/international tendering), and Vietnam; 40 days in Japan. In Nepal and to some extent in Korea, the time allowed depends on the value of the procured goods or service. In Australia and Bangladesh, the minimum submission period can be shortened in cases of emergency. Without such provisions, very long minimum submission periods may force procuring entities into applying emergency procurement procedures, which entail the risks mentioned above. Procurement plans as required in Australia, Korea, and Singapore, for instance, help in the timely preparation of bids for major projects and, hence, in the avoidance of the risks. These countries make their plans for upcoming procurement available on the Internet.

The second requirement for curbing corruption in the context of tender failure is proper management of a failed tender. Regulations must take into account the possibility of tender failure and provide protection against risks of corruption in individual procurement projects. Such protective mechanisms will also make it unattractive for corrupt individuals to stage a failed tender and are thus important means of preventing corruption.

The regulatory frameworks established by countries use different means to curb corruption. Some countries require (e.g., Korea, the Philippines, Thailand) or allow (Mongolia) re-tendering; these countries also require an analysis of the reasons for the failure of the tender. In other countries (P.R. China, Palau), if a tender fails, negotiation is the automatic recourse. Procuring agencies in Japan, Mongolia, and Samoa may either repeat the tender or enter into negotiations. Korea and the Philippines use the direct contracting method when the second attempt to award the contract through tendering fails. In the Cook Islands and other countries, there are no regulatory provisions at all for tender failure.

In Hong Kong, China a tender that would have failed under the circumstances defined by law can be “rescued”: in exceptional cases departments can recommend acceptance of a nonconforming tender to avoid re-tendering but must clearly state the reasons in the tender report. Singapore allows negotiations with bidders if no tender appears to be responsive. Vietnam may extend the bidding period if the bids are fewer than three—technically a failed tender.

Oversight of the selection of the procurement method

Setting clear conditions for deviating from the standard procurement method is necessary but not sufficient to contain the risk of arbitrary selection of procurement method. Verification and oversight of this important decision are essential complements, particularly because manipulations at this early stage are difficult to detect, and even if they are detected, repeating a full tender is often impractical. To meet this objective, the Kyrgyz Republic and Vietnam have opted to require prior approval of the change in the procurement method by an administrative unit at a higher level. In Pakistan and Palau, the deviation from open tendering must be justified in writing. India, under its General Financial Rules, requires the reasons for the resort to single-source procurement in cases of emergency to be recorded and approved beforehand by a competent authority. In Korea, the audit body must receive notice of contracts awarded through methods other than the standard procurement method. Bangladesh and the Philippines, in contrast, do not require the procuring entity to justify the deviation from the standard procurement method and, in addition, exempt this decision from administrative and judicial review.

c. Eligibility and certification

Thematically linked to the selection of the procurement method are restrictions on tendering for public contracts, such as eligibility requirements or certification, which also restrict bidders from participating. The restrictions serve various goals, such as support of national suppliers or small and medium enterprises, efficient handling of procurement process, or protection of procuring entities from fraudulent or incompetent suppliers. Certification procedures generally determine who is eligible to bid.

While all these procedures have legitimate purposes, their utility must be weighed against the potentially greater risk of corruption. Besides limiting competition—and thus increasing the risk of corrupt practices—some of these procedures hold inherent opportunities for corruption and favoritism by virtue of their selection function. These risks can be reduced by a clear definition of the applicable criteria in the law. The relevant regulations must ensure that all applicants are qualified as a matter of principle, that qualification lists are updated regularly, and that any exemptions or disqualifications are made on transparent and nondiscriminatory grounds. Where lists of eligible suppliers are kept,

their existence must be made known and the names of the listed companies must be publicly available.

d. Selection of the winning offer

In procurement through tendering, the evaluation and selection of the winning offer can also be manipulated for corrupt ends. Most countries apply two types of criteria to the selection process: positive criteria are used to select the most advantageous bid among responsive bids submitted by eligible bidders, while negative criteria concern the eligibility of the bidders. Both criteria can be misused, however, such that undue advantage is granted to a bidder or competitors are arbitrarily eliminated. While the procurement frameworks of most of the countries assessed in this report contain some protection against both forms of misuse, it appears that some countries underestimate the risk of manipulation through unfair elimination.

Positive selection criteria

Clear and predetermined criteria for tender evaluation help ensure fair, impartial, and transparent selection and eliminate the risk of abuse. The procurement frameworks of most of the countries reviewed meet this condition. The number of applicable criteria should be reduced as far as possible to avoid the arbitrary selection of priorities among the criteria to unduly favor a bidder. For the procurement of goods, works, and standard services under normal circumstances, price is often considered the sole criterion for selecting among responsive bids from eligible and qualified bidders. All other criteria can be expressed as requirements and specifications. The best price is sometimes referred to as the “lowest evaluated price” or as “value for money”; these concepts imply a comprehensive assessment of all costs and benefits of the bids received. Where other criteria are unavoidable, these must be predetermined and, to the extent possible, quantifiable. Ideally, the weight of each of these criteria must be fixed in advance, perhaps through marking schemes that attach coefficients to the various criteria, to avoid improper considerations induced by corruption.

Not all of the surveyed countries have procurement frameworks that meet these standards. The procurement law in the Philippines explicitly states that price is the sole permitted selection criterion for the procurement of goods; at the same time, it allows the selection of a bidder other than the one offering the lowest price, on grounds that are

not explicitly stated. Hong Kong, China accepts either the lowest tender or makes use of a marking scheme, which must be approved beforehand by a tender board. In the Kyrgyz Republic and Mongolia, the procuring entities use criteria whose relative weight in the selection must be predetermined. Japanese regulations also identify price as the main selection criterion but allow the use of other criteria as well. The procurement frameworks of the Cook Islands, India, Kazakhstan, Mongolia, Palau, and Vietnam, on the other hand, are silent on the possible selection criteria. In addition, India's General Financial Rules explicitly state that only those criteria mentioned in the bidding documents, and no other, may be considered.

Elimination of bidders

Regarding the elimination of bidders in individual tenders, many countries' procurement laws allow or oblige the procuring entities to disqualify bidders for violating rules or providing false information. While disqualification is certainly an adequate means to eliminate bidders who violate the rules, disqualification procedures can also be abused to favor a candidate.

To counter this risk effectively, the conditions for disqualification must be explicit and proportionate to the seriousness of the violation or the error. However, in contrast to the rather detailed regulations on evaluation criteria and procedures, the conditions and procedures for the disqualification of bidders during the tendering process are rather sparse. Where clear criteria are stated, they usually cover fraudulent conduct and provision of false information. Australia, Bangladesh, the Kyrgyz Republic, Mongolia, and Pakistan foresee the possibility of disqualifying a bidder for violation of rules, corruption, or improper conduct. The Kyrgyz Republic, Pakistan, and Vietnam allow or require the authorities to disqualify bidders that have submitted false or incomplete information regarding their qualifications; among these countries, only the Kyrgyz Republic expressly disqualifies bidders who deliberately falsify information, unless the falsification is immaterial to the content of the bid and is immediately rectified by the supplier. To counter the risk of abuse of the instrument of disqualification, the Kyrgyz Republic further requires the consent of a higher authority to render the disqualification of a bidder effective. However, only a few countries have provisions for such procedures.